SUPREME COURT OF THE UNITED STATES

NUMBER_____

OCTOBER TERM, 1983

AVERY C. (PETE) MOORE, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDANT

83-5367

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF LOUISIANA, NUMBER 82-KA-1709

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TO THE HONORABLE, JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

AVERY C. MOORE, a citizen of the United States, respectfully petitions this Court for a Writ of Certiorari to the Supreme Court of Louisiana, upon the following claims.

QUESTIONS PRESENTED FOR REVIEW:

A. Is petitioner's sentence of death for first degree murder in this case disproportionate within the meaning of the Eighth Amendment to the United States Constitution, and within this Court's decision in Enmund v. Florida, _____U.S._____, 102 S.Ct. 3368 (1982), and was he denied equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States, where there was no proof in the trial of the proceedings against him, that he either killed or attempted to kill, no proof of the commission of an armed robbery within the meaning of Louisiana law, only circumstantial proof of an intent to kill, and where a co-defendant on the same indictment was tried and convicted of second degree murder and sentenced to life imprisonment upon the same facts?

B. Are petitioner's rights to due process of law, confrontation of the witnesses against him, and to effective assistant of counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, contravened where a key prosecution witness in the proceedings against him, and who testified at trial, had been previously subjected to hypnosis in order to refresh and enhance his memory?

C. Does Louisiana's tandem application of divergent views concerning standards of review in circumstantial evidence cases, evidenced by the standards of Jackson v. Virginia, 443 U.S. 307, on the one hand, and those of La. R.S. 15:438, on the other hand, deny plaintiff's rights to due process of law and equal protection of the laws, under the Fifth and Fourteenth Amendments to the United States Constitution, where all of the evidence against petitioner relied upon by the State of Louisiana in order to convict him of first degree murder and sentence him to death, is circumstantial, and the State's own evidence shows a reasonable hypothesis of his innocence?

LIST OF ALL PARTIES TO PROCEEDING.

The only other parties to this proceeding are:

THE STATE OF LOUISIANA, whose interests were represented in the Court below by R. Greg Fowler, Assistant District Attorney in and for the Parish of Rapides, State of Louisiana.

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REFERENCE TO OFFICIAL REPORTS OF COURT BELOW.

The decision of the Court below, sought review in these proceedings, is reported at 432 So. 2d 209 (1983).

JURISDICTIONAL STATEMENT

1.

The opinion of the Supreme Court of Louisiana in this case, affirming petitioner's conviction and death sentence was rendered on April 4, 1983.

2.

Petitioner timely applied for a rehearing in the Louisiana Supreme Court, which rehearing was denied by that Court on June 24, 1983.

3.

A death warrant was issued on July 6, 1983, by the trial judge, in the form provided by Louisiana law, commanding that petitioner be executed in the manner provided by Louisiana law on September 20, 1983.

4.

Jurisdiction of this Court is believed to be conferred by the provisions of 28 U.S.C. 1257 (3), as amplified by Rule 17, (b) and (c), Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC., WHICH THE CASE INVOLVES:

A. Constitutional provisions:

1. Constitution of the United States--Fifth Amendment. See Appendix.

2. Constitution of the United States--Sixth Amendment. See Appendix.

3. Constitution of the United States--Eighth Amendment. "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. Constitution of the United States--Fourteenth Amendment. See Appendix

B. Statutes:

1. La. R.S. 14:30. First Degree Murder--See Appendix.

2. La. R.S. 14:64. Armed Robbery--See Appendix.

3. La. R.S. 15:438. Circumstantial Evidence--"The rule as to circumstantial evidence is: 'assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

STATEMENT OF THE CASE

On January 17, 1981, Harold Austin, manager of a convenience store located in a rural area of Rapides Parish, Louisiana, was in the process of closing his store for the night at approximately 10:00 P.M. when he was abducted by individuals in a late model Buick automobile and taken from the convenience store. Approximately one hour later, the Sheriff's office in Rapides Parish, Louisiana, received an anonymous call from someone who had found a body in a ditch on a gravel road approximately three miles from the scene of Austin's abduction. Upon investigation, the body was identified as that of Austin. Austin had been killed almost instantly from a single bullet fired into his back, there being no evidence of any other injury. A revolver, owned by Austin, and some money were missing from Austin when the body was found.

At the time of the abduction, a Rapides Parish Sheriff's Deputy, Bruce Vanderhoeven, had been on routine patrol in the area of the convenience store. Vanderhoeven had stopped his patrol car in the parking lot of a restaurant across the street from the convenience store and observed a Buick automobile parked sideways in front of a door to the store. There were four persons in the car and a fifth person at the front of the store, apparently locking the door. Vanderhoeven observed the fifth individual enter the right rear door of the car, and as the car began to roll away, Vanderhoeven followed the car for approximately two miles, at night. Vanderhoeven had radioed a request for a license check on the vehicle, and the vehicle was shown to be registered to petitioner.

After a short investigation, petitioner and another individual, Vincent Orlando, were arrested in Houston, Texas, and a third individual, Tommy Wren, was arrested in Rapides Parish, Louisiana, for kidnapping, armed robbery, and first degree murder of Austin. Moore and Orlando were subsequently indicted in the same Bill of Indictment by a grand jury for these crimes, and Wren was indicted in a separate indictment.

Upon motion of the State, the indictment against Moore and Orlando was severed, and Moore was tried for first degree murder on March 8, 9, and 10, 1982, and was found guilty of first degree murder by a jury. At a bifurcated sentencing hearing on March 11, 1983, the same jury recommended that Moore be put to death.

A change of venue was granted to Orlando to a different parish in Louisiana, where, after a trial on the merits for first degree murder, upon the same indictment, and upon the same facts as heard by the Rapides Parish jury, on July 3, 1983, was convicted of second degree murder, and was sentenced to mandatory life imprisonment. Wren has not, as of the date of filing hereof, been tried.

During the course of pre-trial proceedings against petitioner, it was discovered by petitioner's attorney and by the attorneys for Orlando and Wren that Vanderhoeven, the only eyewitness to the offense, as part of the State's investigatory process, had been subjected to hypnosis, in order to enhance his memory of the events which he observed on the night of the abduction. Petitioner objected at trial and moved to exclude all of Vanderhoeven's testimony on the basis that the hypnotically enhanced testimony substantially eroded petitioner's rights to due process, to confrontation of the witnesses against him, and to effective counsel. The objection was overruled by the trial judge. Orlando's attorney, in the severed case, filed a Motion to Suppress Vanderhoeven's testimony, on the same grounds. This motion was heard, in an evidentiary hearing, subsequent to petitioner's trial, and was denied by the hearing judge. The Supreme Court of Louisiana granted Certiorari to review the correctness of that holding, and in an opinion handed down January 10, 1983, reported at 425 So. 2d 759, the ruling of the trial judge in that case was affirmed. Orlando was subsequently tried, and was found guilty of second degree murder, and sentenced to mandatory life imprisonment. Petitioner's objection was preserved for appeal on the merits, and this question was argued and submitted to the Louisiana Supreme Court on petitioner's appeal, and rejected, upon the basis of the ruling of that Court in the Orlando case.

Petitioner raised, briefed, and argued to the Louisiana Supreme Court eight specifications of error, all of which were considered by the Louisiana Supreme Court and rejected. In addition to the hypnosis issue mentioned above, there was no evidence introduced by the State at the trial that petitioner actually killed, or attempted to kill, the victim, Mr. Austin, and the only evidence respecting an intent to kill introduced by the State at trial were vague and general statements allegedly made by petitioner and Orlando two weeks to ten days

prior to the abduction to petitioner's niece, Margaret Weems, an admitted dealer in narcotics, that they intended to rob Austin, kill him, and leave his body in a roadside ditch. Weems testified at trial to this effect, and admitted her drug dealings under cross-examination, the introduction of the evidence being hearsay declarations of petitioner and Orlando, there being no formal confessions to law enforcement officers of any kind involved in this case, made either by petitioner, or by alleged co-conspirators.

At trial, the only evidence of the commission of an armed robbery introduced by the State (armed robbery being an essential element of the crime of first degree murder in Louisiana, as well as an aggravating circumstance for the imposition of the death penalty) was the fact that Austin's gun and money, which had been with him earlier in the day, were missing when his body was found. There is no direct evidence in the record as to who relieved him of these valuables, or when he was so relieved. In fact, the State's evidence showed that Austin's body lay beside a rural, but apparently well-traveled road, for some time after his death, and the body was in fact discovered by someone who telephoned law enforcement authorities and would not identify himself, thus creating an inference of a reasonable hypothesis of petitioner's innocence.

It was assigned as error, argued and briefed in the Louisiana Supreme Court that when viewed by applicable Eighth Amendment standards, and particularly in the light of this Court's decision in Enmund v. Florida, _____U.S._____, 102 S.Ct. 3368 (1982), because there is no proof that petitioner was the actual murderer or attempted murderer of Austin, and because the proof of intent to kill is not evident, and further, since there is no direct evidence of armed robbery, the imposition of the death penalty is disproportionate.

In its opinion, handed April 4, 1983, the Louisiana Supreme Court rejected all of the above arguments of petitioner, as well as all other arguments advanced by him for the reversal of his conviction and sentence, noting, especially, that Enmund v. Florida was distinguishable from petitioner's case because in the opinion of the Court, viewing the evidence against petitioner in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and, since the defen-

dant presented no evidence from which any other reasonable hypothesis might be drawn, every reasonable hypothesis of innocence had been excluded.

Petitioner timely filed an application for rehearing calling the attention of the Supreme Court of Louisiana to its decision, also on April 4, 1983, in the matter of State of Louisiana v. Alfred B. Shapiro, No. 81-KA-1905, on its docket, which decision unanimously reversed a prior decision of the same Court in a second degree murder case. The Louisiana Supreme Court held in Shapiro that where an essential element of the crime is not proven by direct evidence, the provisions of Louisiana Revised Statutes, Title 15, Section 438, must apply, the provisions of that statute requiring a reviewer of fact to consider all the facts that the evidence variously tends to prove on both sides of the case, disregarding any choice by the fact finder favorable to the prosecution, the reviewer as a matter of law being able to affirm the conviction only if a reasonable hypothesis other than as presented by the State, is one favorably to the State, and there is absolutely no extant reasonable hypothesis of innocence. On June 24, 1983, the application for rehearing was denied by the Supreme Court of Louisiana, the Court, sub silento, rejecting this argument, as well as the collateral argument made by petitioner for the first time on application for rehearing, that the Court's opinion of April 4, 1983, deprived him of due process because it shifted the burden of proof in a criminal case to petitioner.

Petitioner annexes, in the appendix to this application, copies of all briefs filed in the Louisiana Supreme Court in support of his contentions herein, as well as a brief filed in support of his contentions on the hypnosis issue mentioned hereinabove, showing the stages of the proceedings at which the federal questions addressed in this petition were raised.